

Briefing 3: Understanding Current US Trade Agreement Practice

Analysis of US Regional Trade Agreements and Bilateral Trade Agreements



Freedom-Kai Phillips^{1*}

Executive Summary

Ongoing negotiations for a UK-US Free Trade Agreement hold potential to either foster or frustrate climate-related progress. This paper explores current US treaty practice through review of recent bilateral agreements to identify modalities for addressing factors important to the UK relating to chemicals, regulatory cooperation, agriculture, fisheries, forests, climate change, and dispute settlement. Findings highlight available approaches and shortcomings for addressing environmental considerations, and elucidate practices capturing regulatory alignment in areas such as food quality standards, sanitary and phytosanitary regulatory approaches, and integration of agricultural biotechnology. While current treaty practice provides a basis for environmental protection based on differential domestic standards, greater emphasis should be placed on ensuring a future agreement is sufficiently forward-focused to enable a transition to a green economy.

Introduction

Establishment of a Free Trade Agreements (FTA) between the UK and the US holds the potential to bring long-term economic benefits to both countries, yet questions remain over the environmental cost. While the allure of increased economic growth aligns with important domestic drivers, strong environmental and climate protections are simultaneously achievable within an enhanced trading relationship. Analysis of potential approaches based on current US trading relationships provides insights into areas of convergence and divergence and elucidates a pathway for further ambition.

This paper explores current approaches found in US treaty practice on key areas including chemicals, agriculture and food safety, forests, environmental goods and services, climate change, fisheries, regulatory co-operation, and dispute settlement. First, the US Model Bilateral Investment Treaty (BIT) is summarized to highlight the overall principles, elements and approach underpinning US trade relations.² Second, recent examples provided

^{1*} **Freedom-Kai Phillips**, BSc honors (E. Michigan), MA (Seton Hall), LLB (Dalhousie), LLM (Ottawa), is a researcher at the University of Cambridge, Operations Director and a Legal Research Fellow with the Centre for International Sustainable Development Law (CISDL), a Fellow with the Centre for International Governance Innovation (CIGI), and a member of the IUCN World Commission on Environmental Law. Mr. Phillips has most recently served as Senior Research Associate with the International Law Research Program (ILRP) at the Centre for International Governance Innovation (CIGI), and previously as Interim Director of the Centre for Law Technology and Society at the University of Ottawa Faculty of Law, and Legal Researcher for the Ramsar Convention Secretariat.

² United States, “U.S. Model Bilateral Investment Treaty” (2012), online: <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>. [Model BIT]

by United States-Mexico-Canada Agreement (USMCA)³ and Korea-US (KORUS),⁴ among others, are analysed to draw insight into potential textual approaches. Finally, negotiating proprieties of the UK and the US are summarized to provide further context on potential options, before points of convergence and divergence are offered. It is ultimately submitted that while current US trade practice remains silent on the Paris Agreement, forward-focused interventions could lay the groundwork for enhanced environmental and agricultural protection, regulatory alignment on food standards, and enable a nurturing environment for climate change related innovation.

US Model Bilateral Investment Treaty

The Model BIT provides a minimum standard for establishment of economic relations with the US and includes essential framework provisions including national treatment, most-favoured nation status, minimum standard of treatment, expropriation and compensation, and transfer of funds for the purposes of investment.⁵

The national treatment obligation prohibits any less favorable treatment towards foreign investors in comparison to national investors.⁶ The most-favoured nation obligation provides for an equality of treatment between a foreign investor and an investor from a third state⁷. The minimum standard of treatment prohibits from treating an investor unfairly such as being subject to manifest arbitrary treatment, that is “sufficiently egregious and shocking”.⁸ Expropriation is prohibited, unless the taking is for public purpose; non-discriminatory; accompanied by actual-value compensation.⁹ Lastly, the transfer of funds clause ensures the free transfer of payments, revenues and other funds in relation to an investment through the Host State.¹⁰

Regarding the environment, non-derogation of environmental law to encourage investment is affirmed, in addition to regulatory discretion in implementation, and an emphasis on consultations and public participation.¹¹ Additional model provisions address labour standards, special formalities, denial of benefits derived from the agreement, maintenance and security of classified information, financial services, taxation, and procedural matters such as entry into force.¹² Dispute settlement provisions are provided, covering consultation and negotiation as well as submission for arbitration.¹³ Formation of an arbitral panel encompasses agreement on applicable rules, consent to arbitration, panel selection, consideration of expert reports, conduct and execution of the proceedings, and remedies.¹⁴ A designated procedure is also provided for State-to-State dispute settlement.¹⁵

³ United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2018), online: <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>>. [USMCA]

⁴ United States-Korea Free Trade Agreement (KORUS FTA) (signed 30 June 2007, renegotiated 2010), online: <<https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>>. [KORUS]

⁵ *Ibid*, Model BIT, *supra* note 1, Article 2-7.

⁶ Dolzer and Schreuer, *Principles of International Investment Law*; DiMascio and Pauwelyn, ‘Non-Discrimination in Trade and Investment Treaties’; Diebold, ‘Standards of Non-Discrimination in International Economic Law’.

⁷ *United Parcel Service v. Canada*, NAFTA/UNCITRAL, Award, 24 May 2007 83; *Corn Products International Inc v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, paras 138, 143; *Lander v Czech Republic*, UNCITRAL Award, 3 September 2001, para 220.

⁸ *Metalclad Corporation v. Mex.*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000; *Glamis Gold, Ltd. v. U.S.*, NAFTA/UNCITRAL, Award, June 8 2009, para. 605.

⁹ Article 6 China-Switzerland BIT; Dolzer and Schreuer, *Principles of International Investment Law*, 99–101.

¹⁰ United Nations Conference on Trade and Development, *Transfer of Funds*.

¹¹ *Ibid*, Model BIT, *supra* note 1, Article 12, 16.

¹² *Ibid*, Model BIT, Article 13-15, 17-21.

¹³ *Ibid*, Model BIT, Article 23-24.

¹⁴ *Ibid*, Model BIT, Article 24-34.

¹⁵ *Ibid*, Model BIT, Article 37.

Relevant Aspects of International Treaties

Agriculture and Food Safety

Agriculture plays a central role in some agreements, such as USMCA, where the Parties concluded a dedicated chapter to foster cooperation, remove trade distortions, and grant export restrictions for food security.¹⁶ The importance of domestic support schemes, such as subsidies for the sector is acknowledged, with Parties committing to consider measures which have minimal to no trade distorting effects.¹⁷ We clarify that the aforementioned provision does not include production agricultural and food standards. A Committee on Agricultural Trade is established which provides a forum for promotion of agricultural goods, dialogue, and consultation.¹⁸ Innovation and trade in products of agricultural biotechnology, reduction of disruptions in product availability, and procedural transparency are also promoted.¹⁹ Agricultural biotechnology is defined as the application of biotechnology to modify the heritable characteristics of an organism for use in agriculture or aquaculture.²⁰ In this regard, modern biotechnology is defined, among else, as the application of *in vitro* nucleic acid techniques which includes gene editing and recombinant DNA

A dedicated annex is also provided for agricultural trade between the US and Canada,²¹ which includes procedures for establishment of tariff-rate quotas (TRQs), as well as specific measures for dairy price calculation and grain.²² Technical regulations relating to proprietary formulas, pre-packaged food, and food additives are also provided for to facilitate trade while protecting the confidentiality of information supplied in line with agreed CODEX standards.²³

Endeavouring to eliminate distortive measures through the administration of TRQs, KORUS provides for agricultural safeguard measures (ie. safeguard measures taken for the protection of domestic agricultural industry) for a limited number of listed products on a conditional basis with set tariffs and timetables, while a Committee on Agricultural Trade is established to facilitate coordination toward implementation.²⁴ The administration of TRQs is not related to the administration of food standards. Rather, the satisfaction of food standards The US-Panama Agreement provides a second example capturing Parties' prioritisation of agriculture, leading to inclusion of detailed provisions for TRQs, agricultural safeguard measures, a dedicated compensation mechanism for sugar, and creation of an Agriculture Review Commission and a Committee on Agricultural Trade.²⁵ Further, the US-Colombia Agreement includes provisions on Sanitary and Phytosanitary (SPS) measures related to *Salmonella* on poultry products. Under these provisions, Colombia affirms the equivalence of US meat and poultry inspection services, confirms the sufficiency of control measures, and pledges exports of food products will not be rejected due to concerns of contamination if sufficient documentation is included.²⁶ It should be clarified that equivalence is not merely granted on the basis of assertion but rather it is a product of careful examination of the SPS measures in place and their capacity to satisfy the level of protection set by the importing state.²⁷

¹⁶ USMCA, *supra* note 2, Article 3.2-3.5.

¹⁷ *Ibid*, USMCA, Article 3.6.

¹⁸ *Ibid*, USMCA, Article 3.7.

¹⁹ *Ibid*, USMCA, Article 3.A.3.

²⁰ *Ibid*, USMCA, Article 3.12.

²¹ *Ibid*, USMCA, Annex 3-B.

²² *Ibid*, USMCA, Annex 3-B, Sec B-D.

²³ *Ibid*, USMCA, Annex 3-A

²⁴ KORUS, *supra* note 3, Article 3.3(1-2); 3.4.

²⁵ US-Panama Trade Promotion Agreement, (signed 28 June 2007), Article 3.13-3.20, Annex 3.17, online: <<https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>>. [US-Panama]

²⁶ US-Colombia Free Trade Agreement (signed on 22 November 2006), Sec 6 April 2012 SPS letter exchange (Salmonella in Poultry and Poultry Products). [US-Colombia]

²⁷ Zúñiga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law*.

Observed US treaty practice thus demonstrates that where agriculture is included in an agreement, emphasis is placed on market access, modalities for regulatory collaboration, and more recently, agricultural biotechnology. Hence, issues of human health, environmental protection and other legitimate policy objectives are dealt in other provisions.

Forests

Many jurisdictions place emphasis on forests, in terms of trade in forest products, as well as with an eye to conservation and sustainable management. Under the USMCA, the importance of a healthy forest sector for job creation and livelihoods is emphasised, while reaffirming the value of maintaining the delivery of ecosystem services and social benefits for present and future generations through sustainable sourcing of forest products.²⁸ The Parties commit to develop institutional capacity to promote sustainable forest management and pursue trade in legally-sourced forest products, while cooperating through information exchange.²⁹ Information exchange extends to support efforts to combat illegal trade in wild fauna and flora, as well as timber products.³⁰ In the US-Panama Agreement, the Parties provide an exemption to the national treatment and import and export restriction provisions for Panama relating to export of wood from national forests.³¹ The Parties in the US-Peru Agreement recognize the role of illegal logging in undermining sustainable forest management, and commit to combat trade in products derived from such practices.³² Trade in forest resources requires a range of governance approaches which are informed by the unique characteristics of the trading relationship of the Parties.

Environmental Goods and Services

As WTO negotiations on environmental goods and services remain at an impasse, bilateral trading relationships yield insights and opportunities to address these issues without waiting for a multilateral agreement. The USMCA recognizes the role of trade and investment in advancing environmental goods and services such as clean technologies. As such, Parties are committed to promotion of trade and investment, removal of non-tariff barriers, and cooperation in international fora.³³ The potential removal of non-tariff barriers shall be considered by the Environment Committee which shall identify such practices in cooperation with other relevant Committees.³⁴ In addition, the agreement encourages adoption of voluntary mechanisms that are transparent, designed to maximize customer and environmental benefit, and not unnecessary barriers to trade.³⁵ While experience among US agreements is limited, promotion of trade and investment in innovation as a means of green growth and sustainable development shows potential.

Environmental Cooperation and Multilateral Environmental Agreements

While the term “climate change” is not included in US agreements, recent treaty practice suggests a level of flexibility for trading partners in environmental matters. The USMCA recognises the importance of a healthy environment to sustainable development, obliging Parties to maintain and enforce environmental laws which provide a high level of environmental protection.³⁶ In addition, the Parties recognize the importance of multilateral agreements, commit to implement the ones which they have ratified or acceded to, and cooperate on trade-related issues of mutual interest in relevant international fora.³⁷ Environmental laws which include prevention of emissions of pollutants or contaminants, control of toxic chemicals and wastes, and conservation

²⁸ USMCA, *supra* note 2, Article 24.23(1-3).

²⁹ *Ibid*, USMCA, Article 24.23(4-5).

³⁰ *Ibid*, USMCA, Article 24.22(1-2).

³¹ US-Panama, *supra* note 23, Article 3, Annex 3.2.

³² US-Peru Trade Promotion Agreement (12 April 2006), Annex 18.3.4, Article 1.

³³ USMCA, *supra* note 2, Article 24.24.

³⁴ *Ibid*, USMCA, Article 24.24

³⁵ *Ibid*, USMCA, Annex 12-D, Article 12.D.5.

³⁶ USMCA, *supra* note 2, Article 24.2-24.4.

³⁷ *Ibid*, USMCA, Article 24.8(1-3).

of wild flora and fauna, are to be implemented in a manner which provides a high level of protection, while striving for continued improvement.³⁸

Recognizing the importance of cooperation, the USMCA Environmental Committee was created to advance collective activities, catalogue inputs provided through public consultations, and discuss and review implementation.³⁹ Relevant areas of cooperation include: conservation of biodiversity and the marine environment, protection of the ozone layer, reduction of pollution from ships, and increasing air quality.⁴⁰ Inclusion of measures to foster cooperation on air quality provides an avenue to address some aspects of climate change, for example through the harmonization of GHG monitoring methodologies, strategic planning and modelling, and promotion of control and prevention technologies.⁴¹ Adoption of corporate social responsibility and voluntary mechanisms such as public-private partnerships, auditing and reporting, and market-based measures to protect the natural environment are also encouraged, with civil society involved in the formulation of criteria for evaluation.⁴² Similarly, in KORUS, the US-Panama Agreement, and the US-Colombia Agreement, Parties commit to mechanisms for enhanced environmental performance including through cooperation, environmental consultations, institutional development, and voluntary measures.⁴³ While calls for more robust alignment with the Paris Agreement persist, provisions relating to cooperative measures which are currently deployed provide a minimum framework to address a range of climate-related priorities.

Fisheries

A crucial sector for both the US and the UK, the fisheries sector is anticipated to be a point of focus in a future agreement. The USMCA looks to promote sustainable fisheries management through measures to prevent overfishing and overcapacity, reduce bycatch of non-target species, promote recovery of depleted fish stocks, protect the marine habitat, and prevent harmful and exploitative fishing practices.⁴⁴ The benchmark for overfishing is maximum sustainable yield or alternative reference points based on the best scientific evidence available.⁴⁵ Fisheries management should be grounded in the best available scientific evidence.⁴⁶ Parties agree not to provide or maintain subsidies for fishing vessels or operators listed to be engaged in illegal, unreported, and unregulated (IUU) fishing, or that negatively impact fish stocks.⁴⁷ In addition, the Parties agree not to introduce new or extend previous subsidies, with a view to eliminating overfishing, and must provide and update a list of applicable subsidies every two years.⁴⁸ Combating IUU fishing is prioritized, with Parties committing to implement enhanced port measures, support monitoring, surveillance and enforcement schemes, promote International Maritime Organisation unique vessel identifiers, act in accordance with agreements under Regional Fisheries Management Organizations (RFMOs), and cooperate on exchange of information.⁴⁹ In addition, the Parties commit to cooperate through relevant international fora to advance sustainable management of fisheries, leveraging best scientific evidence and tailoring conservation objectives.⁵⁰

³⁸ *Ibid*, USMCA, Article 24.1,24.3.

³⁹ *Ibid*, USMCA, Article 24.5, 24.26, 24.9.

⁴⁰ *Ibid*, USMCA, Article 24.09-11, 24.15, 24.22,

⁴¹ *Ibid*, USMCA, Article 24.11.

⁴² *Ibid*, USMCA, Article 24.13, 24.14.

⁴³ KORUS, *supra* note 3, Article 20.1-2, 20.5-20.8, 20.10; US-Panama, *supra* note 23, Article 17.6, Annex 17.10; US-Colombia, *supra* note 24, Article 18.5-6, 18.10.

⁴⁴ USMCA, *supra* note 2, Article 24.18(1).

⁴⁵ *Ibid*, USMCA, footnote 28 to Article 24.20.

⁴⁶ *Ibid*, USMCA, Article 24.18(3).

⁴⁷ *Ibid*, USMCA, Article 24.20(1-2).

⁴⁸ *Ibid*, USMCA, Article 24.20(3-6).

⁴⁹ *Ibid*, USMCA, Article 24.21(1-2).

⁵⁰ *Ibid*, USMCA, Article 24.17.

In addition to the environmental cooperation and consultation process, a Fisheries Committee is created under KORUS to foster dialogue on commercial and research activities, and global fisheries matters.⁵¹ The Parties also agree to enforce a high level of environmental protection consistent with their obligations found in a list of covered agreements that include the Convention on International Trade in Endangered Species (CITES), Ramsar Convention, London Protocol, and agreement establishing the Inter-American Tropical Tuna Commission among others.⁵² Inclusion of the dedicated Fisheries Committee aside, the approach adopted is mirrored in the US-Panama Agreement and the US-Colombia Agreement.⁵³

Chemicals

Chemicals management necessitates alignment of central regulatory and reporting components of the agreement and a determination of relevant standards. The USMCA provides a specialized sectoral annex to facilitate the preparation and application of technical regulations for trade in chemical substances. Technical regulations constitute mandatory regulations that impose product specifications, characteristics or related processes and production methods.⁵⁴ The annex enables protection of environmental and human health by furthering conformity analysis, communication of information relating to hazard, safety and storage, and response measures.⁵⁵ The USMCA emphasizes the importance of regulatory compatibility, promoting mutually supportive regulatory development and implementation, while aiming to align risk assessment methodology and management measures.⁵⁶ Parties endeavour to periodically exchange information in effort to strengthen compatibility of chemicals-related regulation in line with the United Nations Globally Harmonized System for Classification and Labeling of Chemicals (GHS).⁵⁷ Under KORUS, Parties agree to effectively enforce environmental law, including laws relating to chemicals, substances, pollutants, and wastes. The Agreement subjects these commitments to evaluation of conduct under the dispute settlement mechanism.⁵⁸ Chemical provisions are directed at alignment of standards and procedures to facilitate the free flow of trade based on mutually agreeable levels of protection.

Regulatory Cooperation

Strong regulatory practices and institutions provide a bedrock for economic relations. In the USMCA, Parties agreed on provisions, principles, and approaches which foster good regulatory practice.⁵⁹ Building upon the foundation of good governance,⁶⁰ the Parties prioritized the promotion of regulatory compatibility and cooperation through such means as exchange of technical information, exploring common approaches, common implementation and sharing of compliance information, and review and evaluation of the impacts on trade and investment.⁶¹ Regarding SPS measures, the Parties committed to enhance compatibility to reduce obstacles in trade and encourage regulatory refinement, ideally toward equivalence while maintaining an “appropriate level” of protection, which does not necessarily lead or relate to an increase or decrease in the level of protection.⁶² Exporting Parties are thereby able to nominate SPS compliant criteria in the regulatory framework of the importing jurisdiction, verified through an audit system.⁶³ To cooperate on trade facilitation, the Parties encourage utilisation of regulatory dialogues, greater alignment of standards and conformity

⁵¹ KORUS, *supra* note 3, Annex 22-C.

⁵² *Ibid*, KORUS, Article 20.1-20.2, 20.3(1) 20.09, 20.10, Annex 20-A.

⁵³ US-Panama, *supra* note 23, Article 23.1-17.3, Annex 17.2.; US-Colombia, *supra* note 24, Article 18.1-18.3, Annex 18.2.

⁵⁴ Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, Annex 1.1

⁵⁵ USMCA, *supra* note 2, Annex 12-A, Article 12.A.2.

⁵⁶ *Ibid*, USMCA, Annex 12-A, Article 12.A.4(1-5).

⁵⁷ *Ibid*, USMCA, Annex 12-A, Article 12.A.4(6), 12.A.5.

⁵⁸ KORUS, *supra* note 3, Article 20.3(1), 20.11(b), Article 20 Confirmation Letter (Equivalence in Environmental Laws).

⁵⁹ USMCA, *supra* note 2, Article 28.1-2.

⁶⁰ *Ibid*, USMCA, Article 28.3-16.

⁶¹ *Ibid*, USMCA, Article 28.17.

⁶² *Ibid*, USMCA, Article 9.7.

⁶³ *Ibid*, USMCA, Article 9.10(1-2, 8).

assessment procedures, and promotion of the acceptance of technical regulations of the other Party as equivalent.⁶⁴ KORUS, the US-Colombia Agreement, and the US-Panama Agreement all provide an institutional approach where representatives may engage standards to enhance cooperation, mutual understanding, and inform regulatory procedures through the Committee on SPS Matters.⁶⁵ These examples demonstrate an aim for progressive alignment on SPS standards.

Dispute Settlement

Inclusion of provisions for differential degrees of dispute resolution aim to provide a facilitative pathway for long-term trade relations. Under USMCA, the scope of dispute settlement applies to interpretation and application of the agreement, evaluation if a measure is inconsistent with the agreement, or consideration if a benefit of the agreement was being impaired relating to national treatment, agriculture, rules of origin, market access for goods and services, SPS, and intellectual property rights.⁶⁶ The USMCA provides a triage process for disputes which includes use of environmental consultations and escalation to senior representative and ministerial consultations.⁶⁷ A formal dispute settlement consultation procedure may be initiated in attempt to develop a mutually satisfactory remedy.⁶⁸ Where an impasse remains relating to an inconsistent measure or discrimination, a panel proceeding may be established with the panel empowered to seek expert technical information in execution of their function.⁶⁹ In cases relating to trade in endangered species, the expert organizations consulted must be accredited with CITES.⁷⁰ With regard to investments, where investor state dispute settlement was found in the preceding agreement, the North American Free Trade Agreement, the USMCA adopts a predominantly consultative approach while providing for legacy or pending claims, and reserving asymmetrical investor state dispute settlement among the US and Mexico.⁷¹

In KORUS, Parties agree that they may request consultations regarding their fulfilment of obligations arising from a predetermined list of international treaties listed as the covered agreements.⁷² Where an impasse persists, further consultations may be requested. The issue can be escalated for consideration by the Joint Committee – a ministerial-level body mandated to advance trade and resolve disputes – or formal dispute settlement procedures can be initiated.⁷³ Importantly, the scope of dispute settlement, both procedural and substantive, includes the environmental provisions of the agreement.⁷⁴

These state to state procedures cannot be firmly accessed in terms of their capacity to genuinely contribute to sustainable development goals since their value is to be accessed with the benefit of time, especially when dealing with procedures, ie environmental consultations, that do not exist in the multilateral level such as the WTO Dispute Settlement, or in other international agreements, example given, Bilateral Investment Treaties that only provide for ISDS procedures.

In terms of compliance, the USMCA also provides the ability for “any person” to file a submission to the Commission for Environmental Cooperation (CEC) asserting that a Party has failed to effectively enforce their environmental laws, with the CEC Secretariat able to support dialogue and dispute settlement.⁷⁵ Both the US-

⁶⁴ *Ibid*, USMCA, Article 11.9(1-4).

⁶⁵ KORUS, *supra* note 3, Article 8.3(1-3); US-Panama, *supra* note 23, Article 6.3; US-Colombia, *supra* note 24, Article 6.3.

⁶⁶ *Ibid*, USMCA, Article 31.2.

⁶⁷ USMCA, *supra* note 2, Article 24.29-24.31.

⁶⁸ *Ibid*, USMCA, Article 31.4.

⁶⁹ *Ibid*, USMCA, Article 31.2, 31.6, 31.15.

⁷⁰ *Ibid*, USMCA, Article 24.32(2).

⁷¹ *Ibid*, USMCA, Annex 14-C, 14-D.

⁷² KORUS, *supra* note 3, Article 20.9.

⁷³ *Ibid*, KORUS, Article 20.9, 22.7, 22.8-22.9.

⁷⁴ *Ibid*, KORUS, Article 20.3(1), 20.11(b), Article 20 Confirmation Letter (Equivalence in Environmental Laws).

⁷⁵ *Ibid*, USMCA, Article 24.27.

Panama Agreement and the US-Colombia Agreement also provide a similar submission process whereby nationals may make a submission to the CEC regarding US compliance with environmental laws.⁷⁶

This could be considered similar to compliance communications submitted by ‘Members of the Public’ in the Aarhus Compliance Committee for issues governed by Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).⁷⁷ It constitutes an a non-confrontational, non-judicial and consultative compliance procedure,⁷⁸ which has effectively incorporated public participation in compliance proceedings.⁷⁹

Negotiating Objectives of the UK and the US

Priorities for the UK underpinning establishment of an FTA with the US focus on achieving enhanced market opportunities for goods and services while not sacrificing food safety, promoting small to medium-sized businesses, and ensuring environmental quality.⁸⁰ Areas such as good regulatory practices and regulatory cooperation, transparency, investment, intellectual property, competition, government procurement, remedies, and dispute settlement are all identified as priorities. Overall emphasis is placed principally on economic considerations as opposed to environment and climate-related intersections. Regulatory standards were identified by the UK as an area of opportunity, as removal of trade barriers allows for greater market access, with the government committed to maintaining labor, environmental, and product quality measures based on international standards.⁸¹ Equivalent treatment of investments and sound dispute settlement in line with modern practice are also prioritised.⁸² Maintenance of strong environmental measures, alignment with international commitments, and a view to how trade can support climate commitments were emphasised.⁸³ Finally, the FTA is positioned as providing opportunities to further climate policy, given common membership in many international environmental agreements and legislative frameworks within the UK and in the US at the State level, despite misalignment at the Federal level.⁸⁴

For the US, shifts in tariff and non-tariff barriers which persisted while the UK was a member of the EU provide a rich opportunity to deepen trading relationships.⁸⁵ Securing market access for US agricultural goods through reduction of tariffs and elimination of distortive practices is prioritised.⁸⁶ Promotion of regulatory compatibility and determination of specific commitments related to trade in agricultural biotechnology are put forward as objectives.⁸⁷ Similarly, regarding SPS, adoption of science-based international standards, reciprocal and predictable market access, and elimination of commercial requirements (i.e., labeling) are emphasised.⁸⁸ On the environment, inclusion of non-derogation, promotion of sustainable fisheries and combating IUU fishing, ongoing evaluation of cooperative activities, and implementation of environmental laws based on international

⁷⁶ US-Panama, *supra* note 23, Article 17.8; US-Colombia, *supra* note 24, Article 18.8.

⁷⁷ 1998 Aarhus Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, 2161 UNTS 447 [Aarhus Convention] Art. 13; V. Koester, The Compliance Committee Of The Aarhus Convention: An Overview Of Procedures And Jurisprudence (2007) 37 *Environmental Policy and Law*, 83-97.

⁷⁸ Commentary On The Convention, Official Journal of The European Union 19.6.2018 L 155/6, Council Decision (Eu) 2018/881 Of 18 June 2018, online: www.unece.org/fileadmin/DAM/Env/Pp/Implementation%20guide/English/Part2.Pdf.

⁷⁹ V. Koester, *supra* note 81.

⁸⁰ Department for International Trade, UK-US Free Trade Agreement (Government of the United Kingdom, 2019), at 6-11 online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf. [UK Position]

⁸¹ *Ibid*, UK Position, at 19-20.

⁸² *Ibid*, UK Position, at 22, 24.

⁸³ *Ibid*, UK Position, at 23.

⁸⁴ *Ibid*, UK Position, at 73-74.

⁸⁵ Office of the United States Trade Representative, United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives (February 2019), online: https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf. [US Position]

⁸⁶ *Ibid*, US Position, at 1.

⁸⁷ *Ibid*, US Position, at 2.

⁸⁸ *Ibid*, US Position, at 2.

agreements to which both are Parties and which are subject to the dispute settlement mechanism are proposed.⁸⁹ Additional priorities include encouraging effective enforcement of environmental measures, fostering stakeholder participation, promoting ecosystem conservation, and mitigation of waste discharge.⁹⁰ Inclusion of consultations to enable early identification and settlement of disputes, both informally and through formal panel procedures, are suggested to support compliance.⁹¹

Points of Convergence and Divergence

Establishment of a UK-US FTA holds economic promise, but also raises environmental policy concerns. While climate change is not specifically recognized in agreements established with the US, inclusion of provisions which recognize international agreements, advance high standards of environmental protection, address air quality, provide for investment in green technology, and move forward consultative measures to advance policy options are promising. In addition, as seen in KORUS, the inclusion of environmental measures under the dispute settlement mechanism provides a pathway to maintain strong levels of environmental protection, leverage dialogue-based collaborative approaches, and ensure action on climate-related elements such as ecosystem conservation and air quality. Current US treaty practice grounded in deference to domestic implementation of environmental measures provides flexibility to maintain a progressive climate-related agenda but lacks the forward-focused cooperative provisions needed to foster buy-in for climate solutions across jurisdictions.

Regulatory alignment provides an area which can prove both beneficial and problematic depending upon the sector. While reducing barriers to trade, the aim of alignment for regulatory approaches, including the removal of labeling, in areas such as agricultural and food products and SPS measures raises concerns for food safety and public health. In addition, the emphasis on decreasing regulatory barriers for integration of agricultural biotechnology, as seen in the USMCA, demonstrates a departure from current UK agricultural practices which should face increased public scrutiny. Cooperative fisheries management, both bilaterally and multilaterally through regional fisheries bodies, provides an area of opportunity for both jurisdictions. Given the uncertain nature of fish stocks in light of overfishing and climate change, an increased emphasis on collaborative management of shared resources is beneficial.

While economic drivers remain predominate influences driving the UK-US trading relationship, addressing climate and other environmental factors should remain a priority. Currently, US treaty practice provides some flexibility in terms of alignment of environmental approaches with international agreements yet remains weak on advancement of the green economy, especially due to the lack of political will to further promote the green agenda under the current administration eg the withdrawal from the Paris Agreement. Sharing of regulatory methodologies to address air quality as seen in the USMCA provides a helpful example of an approach to advance climate-related policy. Despite prioritization of establishing a level playing field for enhanced trade, more attention should be focused on ensuring that the eventual agreement is forward-focused and positions the Parties to advance a green transition.

⁸⁹ *Ibid*, US Position, at 11.

⁹⁰ *Ibid*.

⁹¹ *Ibid*, US Position, at 14.